

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRENDA L. EATON,)
Plaintiff,) CASE NO. C10-5651-MJP
v.)
MICHAEL J. ASTRUE, Commissioner) REPORT AND RECOMMENDATION
of Social Security,) RE: SOCIAL SECURITY DISABILITY
Defendant.) APPEAL

Plaintiff Brenda L. Eaton proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1964.¹ She graduated from high school and has two years of college. She has performed child care services in her home, worked as a bookkeeper, sold party planning goods, operated several home based businesses, and worked in financial planning. (AR 17.)

Plaintiff filed an application for DIB on January 31, 2008, alleging disability beginning December 31, 1993. She is insured for DIB through March 31, 2002. (AR 13.) Plaintiff's application was denied at the initial level and on reconsideration. Plaintiff timely requested a hearing.

On October 2, 2009, ALJ Dan R. Hyatt held a hearing, taking testimony from plaintiff. (AR 21-34.) On October 21, 2009, the ALJ issued a decision finding plaintiff not disabled. (AR 13-20.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on July 13, 2010 (AR 1-4), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 must be determined whether the claimant is gainfully employed. The ALJ found that the
02 evidence was unclear whether plaintiff had engaged in substantial gainful activity after her
03 alleged onset date and through her date of last insured, but gave the plaintiff the benefit of the
04 doubt and analyzed the claim at the additional steps in the sequential evaluation process. (AR
05 15.) At step two, it must be determined whether a claimant suffers from a severe impairment.
06 The ALJ found medically determinable but not severe the conditions of affective disorder,
07 panic disorder, generalized anxiety disorder, personality disorder, and substance addiction
08 disorder. Step three asks whether a claimant's impairments meet or equal a listed impairment.
09 The ALJ found that plaintiff did not have an impairment or combination of impairments that
10 significantly limited her ability to perform basic work related activities for twelve consecutive
11 months and, therefore, did not have an impairment or combination of impairments that met or
12 equaled a listed impairment. Therefore, the ALJ found plaintiff not disabled. (AR 16.)

13 If a claimant's impairments do not meet or equal a listing, the Commissioner must
14 assess residual functional capacity (RFC) and determine at step four whether the claimant has
15 demonstrated an inability to perform past relevant work. The ALJ found plaintiff did not
16 allege any physical impairment in her ability to sit, stand, walk, lift, push, pull, reach, carry, or
17 handle, nor did plaintiff allege any limitation relating to seeing, hearing, or speaking, aside from
18 anxiety related issues. The plaintiff had demonstrated the ability to understand, carry out, and
19 remember simple instructions. (AR 17.) If a claimant demonstrates an inability to perform
20 past relevant work at step four, the burden shifts to the Commissioner to demonstrate at step
21 five that the claimant retains the capacity to make an adjustment to work that exists in
22 significant levels in the national economy. Finding plaintiff not disabled at steps two and

01 three, the ALJ did not proceed to steps four and five.

02 This Court's review of the ALJ's decision is limited to whether the decision is in
03 accordance with the law and the findings supported by substantial evidence in the record as a
04 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
05 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
06 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
07 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
08 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
09 F.3d 947, 954 (9th Cir. 2002).

10 Plaintiff argues that the ALJ improperly determined that plaintiff had no severe
11 impairments prior to her date last insured. Plaintiff also contends the ALJ failed to properly
12 consider the opinion of her mental health counselor. She requests remand for further
13 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by
14 substantial evidence and should be affirmed.

15 Step Two

16 At step two of the sequential evaluation process, a claimant must make a threshold
17 showing that her medically determinable impairments significantly limit her ability to perform
18 basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§
19 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes
20 necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or
21 combination of impairments can be found 'not severe' only if the evidence establishes a slight
22 abnormality that has 'no more than a minimal effect on an individual's ability to work.'"

01 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social Security Ruling (SSR)
02 85-28). “[T]he step two inquiry is a de minimis screening device to dispose of groundless
03 claims.” *Id.* (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the
04 “combined effect” of an individual’s impairments in considering severity. *Id.* A diagnosis
05 alone is not sufficient to establish a severe impairment. Instead, a claimant must show that his
06 medically determinable impairments are severe. 20 C.F.R. §§ 404.1520(c), 416.920(c).

07 Plaintiff takes issue with the ALJ’s conclusion that her medically determinable
08 impairments did not significantly limit her ability to perform basic work activities for twelve
09 consecutive months, arguing that the medical evidence did not “*clearly*” establish that she had
10 no severe impairments persisting for the durational requirements. (Dkt. 18 at 6; emphasis in
11 original.)

12 The Commissioner asserts that plaintiff failed to establish twelve months of mental
13 health-related limitations that prevented her from performing basic work activities. *See* 42
14 U.S.C. § 423 (d)(1)(A) (disability means “inability to engage in any substantial gainful activity
15 by reason of any medically determinable physical or mental impairment . . . which has lasted
16 or can be expected to last for a continuous period of not less than 12 months”); 20 C.F.R. §§
17 404.1505, .1509 (to meet definition of disability, claimant must have a severe impairment
18 preventing work; impairment must have lasted or be expected to last at least 12 months).

19 After finding plaintiff’s affective disorder, panic disorder, generalized anxiety disorder,
20 personality disorder, and substance addiction disorder to be medically determinable
21 impairments (AR 15), the ALJ assessed the extent to which those conditions affected plaintiff’s
22 ability to do basic work activities. First, the ALJ considered plaintiff’s testimony about the

01 intensity, persistence, and limiting effects of her symptoms:

02 The [plaintiff] has alleged she is unable to work due to her depression and
03 anxiety. However, she has exhibited behaviors inconsistent with this
04 allegation. She performed child care in her home for several years until 1997 or
05 1998. She worked as a bookkeeper from 1998 until 2000 or 2001. There is
06 evidence of some work in direct sales of party planning goods from 2000
07 through 2005, earning \$500 per month. After the date last insured, she worked
08 with bakeware and teaching people how to cook between 2002 and 2004 and
09 earned about \$500 per month. In 2006, she opened a home based business in
10 Creative Memories, a scrap-booking business and earned \$300 to \$400 per
11 month. In 2007, the [plaintiff] worked for Morgan Stanley Financial Planners.
12 While the jobs performed after the date last insured do not directly relate to the
13 period under consideration, it does raise questions regarding the [plaintiff]'s
14 credibility. Throughout the period of alleged disability, she demonstrated the
15 ability to perform ongoing work activity.

16 (AR 17; citations to administrative record omitted.)

17 The ALJ noted that plaintiff did not allege any physical impairment in her functional
18 abilities, and found that she demonstrated the ability to understand, carry out, and remember
19 simple instructions. The ALJ observed that plaintiff calls in and/or emails her doctor as
20 requested, takes her prescribed medication, and has demonstrated her ability to use her
21 judgment by opening several small businesses, including a day care. The ALJ noted the lack
22 of evidence that plaintiff had difficulty responding appropriately to supervision, co-workers,
and usual work situations or changes in a routine work setting. Her ability to travel showed her
adaptability to her surroundings. The ALJ found that, as a small business owner, plaintiff
would be required to communicate with a variety of different personalities. (*Id.*)

23 The ALJ also considered the intensity and persistence of plaintiff's symptoms:

24 The [plaintiff]'s condition has waxed and waned over the years. Initially, her
25 depression was thought to be post-partum depression and there was anticipation
26 of a full recovery. On July 30, 1994, Dr. McFarland wrote a letter on the

01 [plaintiff]'s behalf. He indicated the [plaintiff] had made an "excellent
02 recovery" and was well qualified to provide day care for a total of five children.
03 While the plaintiff has had brief periods of increased symptoms, her treatment
04 has been intermittent and conservative. The [plaintiff] had a brief exacerbation
05 of her symptoms in the summer of 1999 relating to anxiety over her son starting
06 first grade. However, by January 2000, the [plaintiff] reported she was feeling
07 much better and did not need to keep her scheduled appointment. Over the
years, the [plaintiff]'s medications were monitored. She reported decreased
anxiety and improved appetite in December 2002. In January through April
2003, the [plaintiff] reported her depression and anxiety were stable and pretty
well under control. Overall, there were no periods of prolonged anxiety or
depression which would cause a significant limitation on the [plaintiff]'s ability
to perform work related activities.

08 (AR 17-18; citations to administrative record omitted.)

09 The ALJ then proceeded to follow the special technique for evaluating mental
10 impairments (20 C.F.R. § 404.1520a):

11 The first functional area is activities of daily living. In this area, the [plaintiff]
12 has a mild limitation. She does household chores including dishes and laundry.
13 She takes care of personal grooming and her health, as evidenced by her
enjoyment of running. She has two children and enjoys doing activities with
them and her husband. She can drive and grocery shop.

14 The next functional area is social functioning. In this area, the [plaintiff] had a
15 mild limitation. She spends time with her husband and children. The records
reflect trips to Disneyland and San Francisco. The [plaintiff] also enjoys
attending church. In July 2002, the [plaintiff] stated she was going to her
friend's house for scrapbooking and later that night for her monthly book club
meeting. She is able to go on family vacations, indicating the [plaintiff] is able
17 to be around others.

18 The third functional area is concentration, persistence or pace. In this area, the
19 [plaintiff] has a mild limitation. The [plaintiff] has run several businesses out
20 of her home demonstrating an ability to concentrate on her business, continue
with the business, and keep up with the needs of her customers. In 1999, the
21 [plaintiff] reported she had good concentration. She had been working
part-time as a bookkeeper. The [plaintiff] has engaged in various other
activities reflecting an ability to concentrate, including reading and doing
activities with her children.

22 One of the [plaintiff]'s work related activities crosses all three of the above

01 functional areas. For several years, the [plaintiff] ran a day care, caring not
02 only for her own children, but for other children. It required her to take care of
03 preparing meals for children, cleaning up as needed, and caring for the needs of
04 the children. It required the [plaintiff] to engage socially with the children and
the parents of the children. Lastly, it required the [plaintiff]'s concentration,
persistence, and pace. The [plaintiff] must monitor the children and keep the
children on task.

05 The fourth functional area is episodes of decompensation. In this area, the
06 [plaintiff] had experienced one episode of decompensation which was of
07 extended duration. On January 17, 1994, the [plaintiff] was admitted to the
08 hospital due to depression with suicidal thoughts. She remained in the hospital
09 for two weeks before being discharged in stable condition. However, the
[plaintiff]'s condition improved significantly over the following few months and
became stable. While there is evidence of more recent incidents, they are
outside the period under consideration.

10 (AR 18-19; citations to administrative record omitted.)

11 Therefore, the ALJ concluded, because plaintiff's medically determinable impairments
12 caused no more than "mild" limitation in any of the first three functional areas and no episodes
13 of decompensation of extended duration in the fourth area, the impairments were non-severe,
14 and plaintiff was not under a disability as defined in the Social Security Act. (AR 19, 20; citing
15 20 C.F.R. § 404.1520 (c), 1520a (d)(1).)

16 Plaintiff agrees that her symptoms have waxed and waned during the relevant time
17 period. (Dkt. 18 at 7.) However, she disputes the ALJ's conclusion that her impairments did
18 not cause more than a minimal effect on her ability to do basic work activities for an extended
19 period. Plaintiff takes issue with the ALJ's reliance on the lack of record evidence showing
20 that she had difficulty responding to supervision, co-workers, or unusual situations, arguing
21 that none of her past work activity involved these types of circumstances.

22 The Commissioner argues that the ALJ's interpretation was reasonable and should be

01 given deference. *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (“The ALJ’s
02 findings will be upheld ‘if supported by inferences reasonably drawn from the record...’”)
03 (citing *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004)). The
04 Court agrees with the Commissioner.

05 The ALJ provided legally sufficient reasons to support the finding that plaintiff did not
06 meet her burden of establishing an impairment or combination of impairments that significantly
07 affected her ability to perform basic work activities for twelve consecutive months. While
08 plaintiff experienced periods of increased symptoms, these were interspersed among periods of
09 improvement and stability. (AR 16.) The ALJ found the periods of increased symptoms to be
10 “brief” and in response to specific situations such as plaintiff’s son starting first grade. (AR
11 17.) The ALJ noted that plaintiff demonstrated the ability to perform ongoing work activity
12 through the period for which she alleged disability. (*Id.*)

13 Plaintiff does not dispute, and, in fact, agrees with the ALJ’s finding that her depression
14 and anxiety waxed and waned over the time in question. Citing Dr. McFarland’s records,
15 plaintiff notes that she was “doing well” in May 2000, reporting extreme anxiety and panic
16 attacks “*over the previous few weeks*” in September 2000, and again reporting extreme anxiety
17 to depression “*during the previous few weeks*” in December 2000. (AR 764-68; emphasis
18 supplied.) She does not successfully rebut the ALJ’s conclusion that “[o]verall, there were no
19 periods of prolonged anxiety or depression which would cause a significant limitation on the
20 [plaintiff]’s ability to perform work related activities.” (AR 18.) The Court concludes that the
21 ALJ’s interpretation was rational, supported by substantial evidence, and should be upheld.

22 / / /

Opinion of Anne Olwine, LMHC

02 Plaintiff received counseling services from Anne Olwine, a licensed mental health
03 counselor, starting in 1993. (AR 423-614.) Ms. Olwine's opinions are set forth in the record in
04 a letter dated March 8, 2008 (AR 280), a questionnaire completed on September 30, 2009 (AR
05 836-40), and a letter dated October 5, 2009 (AR 841). Plaintiff argues that the ALJ overlooked
06 the October 5, 2009 letter in evaluating Ms. Olwine's opinions, and further contends that the
07 ALJ should have given more consideration to Ms. Olwine's opinion as to plaintiff's ability to
08 function.

In evaluating the weight to be given to the opinion of medical providers, Social Security regulations distinguish between “acceptable medical sources” and “other sources.” Acceptable medical sources include, for example, licensed physicians and psychologists, while other non-specified medical providers are considered “other sources.” 20 C.F.R. §§ 404.1513(a) and (e), 416.913(a) and (e), and SSR 06-03p. Less weight may be assigned to the opinions of other sources than acceptable medical sources. *Gomez v. Chater*, 74 F.3d 967, 970 (9th Cir. 1996). However, “[s]ince there is a requirement to consider all relevant evidence in an individual’s case record,” the ALJ’s decision should reflect the consideration of opinions from medical sources who are not “acceptable medical sources” as well as “non-medical sources” such as teachers, school counsellors, and social welfare agency personnel, who have seen the claimant in their professional capacity. SSR 06-03p. “[T]he adjudicator generally should explain the weight given to opinions from these ‘other sources,’ or otherwise ensure that the discussion of the evidence in the determination or decision allows a claimant or subsequent reviewer to follow the adjudicator’s reasoning, when such opinions may have an effect on the

01 outcome of the case.” *Id.*

02 Ms. Olwine, a licensed mental health counselor, is not regarded as “an acceptable
03 medical source” under Social Security regulations. 20 C.F.R. § 404.1513. Therefore, her
04 opinions are analyzed as lay testimony. *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217,
05 1223-24 (9th Cir. 2010).

06 Lay witness testimony as to a claimant’s symptoms or how an impairment affects ability
07 to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).
08 The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each
09 witness. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (“[L]ay testimony as to a claimant’s
10 symptoms is competent evidence that an ALJ must take into account, unless he or she expressly
11 determines to disregard such testimony and gives reasons germane to each witness for doing
12 so.”)) *Accord Turner*, 613 F.3d at 1223-24.

13 Considering Ms. Olwine’s opinions, the ALJ found as follows:

14 Ms. Olwine wrote a letter dated March 8, 2008 regarding the [plaintiff]’s
15 condition. At the time of the letter, the [plaintiff] had recently been
16 hospitalized for suicidal ideation. Ms. Olwine opined the [plaintiff] should not
17 work due to the pressure of employment. This opinion has been given no
18 weight as it relates to the [plaintiff]’s status in 2008, not the period under
19 consideration. Ms. Olwine’s letter indicates the [plaintiff] had only two
20 periods of regular treatment. Aside from those periods, the [plaintiff] would
21 call as needed, when her symptoms increased. Ms. Olwine provided no
22 limitations or opinion regarding work related functioning for the period under
consideration.

On September 30, 2009, Ms. Olwine opined the [plaintiff] had marked
limitations in social functioning and concentration, persistence, or pace with
moderate limitations in activities of daily living. She opined these limitations
have been in place since at least March 2002. However, the evidence does not
support finding the [plaintiff]’s activities are as severe as opined. Specifically,
the [plaintiff] was noted to travel on vacations with her family; she has been

01 raising her children; and she attended church on a regular basis. These are not
02 activities of a person with moderate to marked limitations. Ms. Olwine opined
03 the [plaintiff] had marked limitations in her ability to perform activities within a
04 schedule, maintain attendance, and be punctual within customary tolerances.
05 However, there is no reference during the period under consideration of the
[plaintiff]'s failure to attend appointments or arriving late for appointments.
Ms. Olwine provided no objective evidence in support of her opinion. Rather,
it appears she was basing her assessment, in part, on the fact the [plaintiff] had
worked only part-time in the past.

06 (AR 19; citations to administrative record omitted.)

07 Although plaintiff assigns error to the ALJ's failure to reference Ms. Olwine's October
08 2009 letter, she does not point to any specific opinion articulated by Ms. Olwine in that letter
09 that had not also been expressed in Ms. Olwine's previous communications, other than to state
10 that the October 2009 letter "described more fully the basis for Ms. Olwine's assessment."
11 (Dkt. 18 at 10.) Although Ms. Olwine opines that plaintiff "is unable to perform the type of
12 tasks required to be successful in obtaining and employment and would be unable to maintain
13 employment of any kind[,]" (AR 841), the question of a claimant's employability is reserved to
14 the Commissioner. Therefore, the source of an opinion on this issue is not given any special
15 significance. 20 C.F.R. § 404.1527(e)(1) and (3).

16 To qualify as germane, a reason for disregarding the testimony of a lay witness must be
17 more than a wholesale dismissal of all such witnesses as a group, but rather must be specific to
18 the individual witness. *Smolen*, 80 F.3d at 1288 (finding not germane the reason given by the
19 ALJ for dismissing the lay witness testimony because it came from "family witnesses" who
20 were therefore 'undoubtedly advocates, and biased', since this "amounted to a wholesale
21 dismissal of the testimony of all the witnesses as a group and therefore does not qualify as a
22 reason germane to each individual who testified.") Here, the ALJ did not propound a

1 wholesale dismissal of the opinions of individuals such as Ms. Olwine as a group, but rather
2 provided reasons specific to her, that is, germane reasons. The ALJ noted that the opinions
3 expressed in Ms. Olwine's March 8, 2008 letter did not pertain to the time period at issue,
4 before plaintiff's date last insured of March 2002. The ALJ contrasted Ms. Olwine's opinions
5 with the evidence of plaintiff's daily activities which the ALJ found to exceed those of a person
6 with moderate to marked limitations. The ALJ noted the lack of evidence that plaintiff failed
7 to attend or arrived late for appointments, as well as the lack of objective evidence proffered by
8 Ms. Olwine for her opinions. The ALJ also concluded that Ms. Olwine seemed to base her
9 assessment, in part, on the fact that plaintiff had only worked part-time in the past.

10 Although plaintiff argues that the ALJ should have given more weight to Ms. Olwine's
11 opinion than was accorded it, the reasons articulated by the ALJ were legally sufficient. The
12 Court does not find error in the ALJ's assessment of Ms. Olwine's opinions.

CONCLUSION

14 For the reasons set forth above, this matter should be AFFIRMED.

15 DATED this 19th day of August, 2011.

Mary Alice Theiler
Mary Alice Theiler
United States Magistrate Judge